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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 ANDRE SMITH, SR.,

11 Petitioner,

No. CIV S-00-0766 FCD JFM P

12 vs.

13 ATTORNEY GENERAL OF
14 CALIFORNIA,

15 Respondent. /

ORDER

16 Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas
17 corpus pursuant to 28 U.S.C. § 2254. On November 20, 2000, judgment was entered in this
18 court denying the petition. On December 23, 2004, petitioner filed a notice of appeal. Before
19 petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c);
20 Fed. R. App. P. 22(b). Federal Rule of Appellate Procedure 22(b) requires the district court
21 judge who rendered a judgment denying such petition to “either issue a certificate of probable
22 cause or state the reasons why such a certificate should not issue.”

23 The timely filing of a notice of appeal is a jurisdictional requirement. Scott v.
24 Younger, 739 F.2d 1464, 1466 (9th Cir. 1984). Here, the time limit for filing a notice of appeal
25 following entry of judgment is thirty days. See Fed. R. App. P. 4(a). Petitioner's notice of appeal
26 in this action was filed more than thirty days after entry of judgment.

The United States Court of Appeals for the Ninth Circuit has held that the issuance of a certificate of probable cause cannot vest the court of appeals with jurisdiction if jurisdiction is not proper in that court. Hayward v. Britt, 572 F.2d 1324, 1325 (9th Cir. 1978). The rationale of Hayward applies with equal force to a certificate of appealability. For these reasons, the court declines to issue a certificate of appealability.

IT IS SO ORDERED.

DATED:October 19, 2005

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL JR.
United States District Judge